No. 80-876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GERALD H. SCARPELLI,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REVIEW OF THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT, NO. 79-501

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the restriction of cross-examination of the arresting officer as to petitioner's height or to pre-trial preparation was harmless beyond a reasonable doubt where the identification of petitioner was not in issue at trial.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Second Judicial District, affirming petitioner's conviction is submitted to this Court as an exhibit to the Petition for Writ of Certiorari and, therefore, is not contained in this brief in opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant his Petition for Writ of Certiorari.

STATEMENT OF FACTS

The Illinois Appellate Court opinion adequately sets forth the relevant facts.

REASON FOR DENYING THE WRIT OF CERTIORARI

THE IDENTIFICATION OF THE PETITIONER WAS NOT IN ISSUE AT TRIAL; THEREFORE, THE RESTRICTION OF CROSS-EXAMINATION OF THE ARRESTING OFFICER AS TO PETITIONER'S HEIGHT OR TO PRETRIAL PREPARATION WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner alleges his sixth amendment right to confrontation was violated by the trial court's improper restriction of cross-examination of Officer Culen. Specifically, petitioner cites to the record where the trial court restricted his inquiry into Officer Culen's pretrial preparation and his recollection regarding the height of the person he saw enter the Monte Carlo, the car that petitioner was charged with stealing.

The Illinois Appellate Court for the Second Judicial District correctly determined that any error in restriction of cross-examination by the trial court was harmless because no reasonable doubt existed that the exclusion of this testimony could have contributed to the petitioner's conviction. The Illinois Appellate Court found the following facts had been testified to by Officer Culen, a Willowbrook police officer. Officer Culen was engaged in the stakeout of a bowling alley parking lot where numerous car thefts had occurred. The night was clear and he had an unobstructed view of the parking lot which was illuminated by large vapor lights. He observed a vehicle enter the parking lot, drive slowly up and down several aisles, pass a number of empty parking spaces, and stop at the end of an aisle close to Officer Culen's location. He saw two people get out of the car and clean the windshield or lights and return to the car. One emerged carrying a small black bag pressed against his stomach and walked down the row to a 1975 Chevrolet Monte Carlo located under one of the lot's vapor lights. Officer Culen started his car and observed the person enter the Monte Carlo on the driver's side; no other pedestrians were in the lot at that

time. Officer Culen drove up behind the Monte Carlo and parked as the Monte Carlo started to back out of the space. Immediately, Officer Culen got out of his car and approached the person who was still in the car and called out, "Police officer, freeze or halt!" Officer Culen was about 15 feet away from the man at that point and observed him run from the car to the west. In pursuit Officer Culen kept him within his sight and within a distance of 20 feet until he was apprehended.

In holding that the exclusion of inquiry into pre-trial preparation of Officer Culen and of inquiry into his description of the petitioner's height at the preliminary hearing was harmless error, the Illinois court stated that this was not a case where the defendant was apprehended some time later on the basis of a description based on clothing, height, and size. That is, the credibility of Officer Culen's testimony did not depend on his ability to observe the defendant, the number of vehicles in the parking lot, the color of the car, etc., for the petitioner does not deny he was present in the parking lot that evening or that he was the one pursued by Officer Culen and apprehended. Indeed, petitioner could hardly deny this.

Petitioner's defense consisted of claiming that Officer Culen was deliberately lying, not merely claiming that the officer could have been mistaken that the petitioner was inside rather than outside the Monte Carlo before he fled from the parking lot. Petitioner testified that he was in the parking lot on his way to the bowling alley for a drink when he noticed a man slumped over the wheel in a car with its lights on. When he approached the car, he saw a man (Officer Culen) standing by the driver's side and pointing a gun at him whereupon petitioner ran out of fear for his life. Petitioner presented the testimony of three witnesses to corroborate his story. Karen Garcia testified she dropped the petitioner off at the bowling alley so that he could have something to drink while she shopped at a nearby store. William Congleton and Linda McCormick testified that they saw two men run away from the parking lot while a third man exited the Monte Carlo and ran in the opposite direction of the other two. Therefore, Officer Culen's credibility did not depend

on whether or not he could see whether there were two men in the Monte Carlo. Petitioner does not claim that the officer could have been mistaken as to whether the petitioner was inside or outside the car. Therefore, either Officer Culen was telling the truth or he was lying when he stated the man he chased was first inside the Monte Carlo. Petitioner does not deny that the man pursued by Officer Culen and apprehended was he. Therefore, the jury had to choose between two conflicting stories; they chose to believe Officer Culen's testimony that the petitioner got into the Monte Carlo, not the petitioner's story that he was an innocent bystander. To believe petitioner's version of the facts, the jury would have to believe that Officer Culen would abandon a suspect whom he had covered with a gun and whom he suspected of theft in order to give chase to a man who happened to walk innocently upon the scene. As the Illinois Appellate Court stated, in order to believe defendant's testimony the jury would necessarily have been forced to conclude that Officer Culen deliberately lied on the stand in order to secure a conviction.

Therefore, in light of the evidence presented at trial, the alleged improper restriction of cross-examination of Officer Culen was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U. S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Petitioner alleges that Officer Culen stated at the preliminary hearing that the suspect's height was between five feet, six inches tall and five feet, ten inches tall, whereas at trial he testified the defendant was no taller than five feet, nine inches tall; at best this represents a one-inch discrepancy.

However, any restriction of cross-examination as to any discrepancy in height in Officer Culen's description of the petitioner must certainly be harmless, as the petitioner did not deny that he was the man pursued by Officer Culen in the parking lot that evening or that Officer Culen could have been mistaken as to the fugitive's presence in the Monte Carlo. The other specific allegation of restriction of cross-examination dealt with the pretrial preparation of Officer Culen as to whether he

had conversed with the State's Attorney. Such evidence certainly could not have influenced the jury's verdict in light of the undisputed identification of the petitioner and because the petitioner's defense challenged Officer Culen's veracity, not merely his credibility.

The case of *Allison* v. *Gray,* 603 F. 2d 633 (7th Cir. 1979), relied on by petitioner, is not on point, for there the defendant was precluded from presenting alibi witnesses and the court was unable to apply the test of harmless error because there was no indication in the record of what the alibi evidence was. However, in the instant case, the petitioner was able to present his defense to the jury. In *Allison* the court reasoned that the alibi might be a complete defense to the crime charged. By contrast, in the instant case, whether or not the officer had discussed his testimony with the State's Attorney or given a more vague description of the petitioner's height could in no way present an absolute defense to the crime charged.

Furthermore, the cases relied on by petitioner, where this Court held that the petitioner's sixth amendment right to confrontation was violated, concern facts where a traditional area of cross-examination was completely denied to the defense. In *Smith* v. *Illinois,* 390 U. S. 129, 89 S. Ct. 748, 19 L. Ed. 2d 956 (1968), the defense was precluded from asking the witness's correct name and address after the witness admitted that the name he had given was false. This Court relied on *Alford* v. *United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624 (1931), which also reversed because the defense could not ask the address of a prosecution witness who happened to be in the custody of federal authorities. In *Alford* the Court noted the defense had been denied the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test. Also in *Davis* v. *Alaska,* 415 U. S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the defense was denied the opportunity to cross-examine as to the juvenile record of a crucial prosecution witness for the purpose of showing bias. Furthermore, *Brookhart* v. *Janis,* 384 U. S. 1, 86 S. Ct. 1245, 16

L. Ed. 2d 314 (1966) is certainly distinguishable, for there the defendant was completely denied the right to cross-examine the witnesses who testified against him. Finally, in *United States* v. *Jackson,* 482 F. 2d 1167 (10th Cir. 1973), *reh. denied,* (1973), *cert. denied,* 414 U. S. 1159 (1973), the opinion actually supports respondent's position, for there the court held that the alleged restriction of cross-examination was not reversible error because the defense had not been completely denied access to an area which was properly the subject of cross-examination.

Likewise, in the instant case, petitioner does not claim he was completely denied cross-examination into proper areas. His allegations, as in *Jackson,* concern the extent of cross-examination into several areas. (See Petition, p. 7) In these allegations the petitioner fails to claim a total absence of cross-examination but rather complains of the extent of the cross-examination which petitioner fails to show was prejudicial as in *Jackson.*

Furthermore, in *United States* v. *Hill,* 589 F. 2d 1344 (8th Cir. 1979), the restriction of cross-examination that concerned matters that were repetitive, irrelevant, or immaterial did not prejudice the defendant. In the instant case, the number of cars in the parking lot, the position of the individual in the car, the color of the Monte Carlo, e.g., do not concern relevant matters to impeach Officer Culen's testimony. The petitioner would have had to show that Officer Culen was practically blind before his testimony could be impeached that the man he chased got out of the Monte Carlo.

Petitioner has failed to show that he was prejudiced by the restriction of cross-examination which was irrelevant, immaterial, and repetitious. Furthermore, because the petitioner's defense consisted of attempting to show Officer Culen deliberately lied and not that he was mistaken as to petitioner's presence in the Monte Carlo, Officer Culen's pretrial preparation or prior description of the petitioner's height, which at most conflicted with his trial testimony by one inch, beyond a reasonable doubt could not have influenced the jury's verdict.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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